O. Torts/43

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File No.

Legal Department

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Subject

Opinions

Regarding Torts

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C O N T E N T S.

Legal Department File No. C Torts/1943.

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Office of the P.L.A.

The Collector of Satara in exercise of the powers conferred on him by sub-rule (1) of rule 76-A of the Defence of India Rules has requisitioned certain lands in the Satara District and has directed that their possession may be delivered to the Military Estates Officer, Poona, Circle, on such date as the lattermay appoint subject to conditions specified therein. As these lands were to be used for field firing practice, the Bombay District Commander requested Government to issue a notification to the effect that no compensation would be payable by the military authorities for death or injuries caused to tresspassers entering the danger area while firing takes place. (page 35 ante). The Secretary, Home Department, presumes that any person remaining on this are, after it has been acquired by the military would be a tresspasser and therefore he would not be entitled to any compensation, if he is killed or injured during the firing practice. The question for the consideration of the P.L.A. is whether a person who is a trespasser, if injured or killed during the firing practice by the military authorities on lands requisitioned by them would be entitled to any compensation.

2. It is true that Government has requisitioned the lands in question. But that doesnot mean that every person on the land is trespasser. Beofre requisitioning, there must have been rights of ways, rights of grazing and other such rights over these lands. The mere fact of requisitioning doesnot abolish these rights. The requisitioning authority may after requisitioning, no doubt prohibit the exercise of these rights. But until that is done those rights would subsist. Further, if persons are allowed to remain on the land they may acquire a license to remain and would not legally be regarded as trespassers. Altogether there are many lawful rights

and occasions which may justify the presence of a person on these lands. To deal with such a situation Government or the military authorities may remove all persons on the land, close all paths and prohibit entry. After that is done any one found on the land would be a trespasser. But until that is done it cannot be assumed that persons on the land are trespassers merely because the land has been requisitioned.

3. The military authorities appear to think that the land is the property of Government and therefore there is no need to take measures for the security of the public. It is doubtful whether that is correct even of land which has been acquired and vests completely in Government. But the present land has been merely requisitioned and not acquired. Rule 75-A of the Defence of India Rules makes a distinction between "acquisition" and "requisitioning". Requisitioning gives to the requisitioning authority the possession, use and contol of the land, but the land does not vest in the authority. The original owner still remains the owner, although his rights are, so to speak, suspended. Attention is invited to the provisions of rule 75A of the Defence of India Rules and the recent opinion of the F.L.A. No. 5733 dated 14th July 1942 and Advocate General's opinion No. dated 15th July 1942, on this point. Copies of these opinions are sent herewith.

4. The Indian Military Manoeuveres Act (No. V) of 1938 provides facilities for holding manoeuvres over any land. There are detailed provisions in that Act to secure the safety of the public. It seems however that the Act is intended to be applicable only to lands which are not already in the control of Government or the military. It would not therefore apply in the present case. But there still remains the need to secure the safety of the public. It may be noted that in the English Military Lands Act, 1892, the Secretary of State is empowered in cases where land belonging to a Secretary of State or to a volunteer corps is for the time being appropriated for any military purpose, to make

bye-laws to secure the public against danger. It seems clear that unless proper measures are taken to clear the land and prohibit entry, Government or the military authorities are in grave danger of incurring liability for accidents to civilians. The anxiety of the local officers in this point is well founded. It willnot be enough to publish a notification to the effect that "no compensation shall be payable by the military authorities for death or injury occurring to trespassers intruding the dangerous danger area while firing is taking place." Even a trespaser has certain rights to be warned of danger. But in view of the above, it does not seem necessary to deal with that rather complicated question. If proper measures are taken to secure the safety of the public, these measures would include both trespassers and non-trespassers.

Sd/- P.N.M. 22-1

Remembrancer of Legal Affairs.

U.P. to H.D. No. 42-confl., dated the 22nd January 1943.

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Office of the F.L.A.

Attention is invited to District Magistrate's endorsement at page 37 and H.D. notes at pages 49-50 ante. Mr. S.S. Desai the applicant was sent by the Range Forest Officer, Hungal to the First Class Magistrate, Hungal in custody to have his confession recorded for an offence alleged to have been committed by him under the Forest Act, 1927. The offence or the section of the Forest Act with which he was charged has not been stated. As the applicant refused to make any statement he was remanded to the custody of the Magistrate for 5 days on 17-4-42 as requested by the Range Forest Officer. The Range Forest officer applied on 20th April 1942 for remand which was granted till 28th April 1942. In the meantime, on 21st April 1942 the applicant applied for bail through his pleader but the bail was refused on 22nd April 1942. On 24th April 1942 he was released. He has now applied to Government for sanction under section 197 of the Criminal Procedure Code, 1898, to prosecute the Magistrate for offences under sections 166 and 343 of the Indian Penal Code. The Under Secretary, H.D. is of the view that as the mistakes committed by the Magistrate in refusing bail were obvious laches of procedure and as there is nothing to show that he did not act bona fide the sanction under section 197 asked for by the applicant should be refueed. The Secretary H.D. agrees with this view but considers that the party is entitled to some compensation ex gratia. The question for consideration of the F.L.A. is whether the grant of compensation ex gratia to the applicant would prejudice Government or the Magistrate in any civil suit which the applicant might later file.

Section 1 of the Judicial Officers' Protection

Act, 1850, provides that no Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially shall be liable to be sued in any civil court for an act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction; Provided that he at the time, in good faith, believed himself to have jurisdiction to do or order the act complained of, etc. It is evident that to secure protection under this Act, it is necessary to show

(i) that the act complained of was done or ordered to be done by him in the discharge of his judicial duty, and

(ii) that he, at the time, in good faith, believed himself to have jurisdiction to do or order the act complained of.

Both the District Magistrate, Dharwar and the sub-Divisional Magistrate, II Division, Dharwar, State that Mr. S.S. Isac, the First Class Magistrate Hangal, acted bona fide. andthat no mala fide motive is attributed to him by the applicant. In his explanation Mr. Isac states: "I believed bona fide that the petitioner was suspected to have been involved in a serious offence and that I had no power under section 167, Criminal Procedure Code, etc.," Perhaps Mr. Isac escapes liability in view of those facts but it is unnecessary to say definitely whether or not Mr. Isac could be sued. If he were sued, attempts would certainly be made to show that Government's ex gratia payments were conclusive of Mr. Isac's civil liability. But provided Government has made it clear that it believes Mr. Isac acted in good faith thinking himself possessed of jurisdiction, such payments ought not to prejudice Mr. Isac. Government is not civilly liable for the torts or misfeances of its servants. The question therefore whether the payments would prejudice

Government does not arise.

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Remembrancer of Legal Affairs.

U.T. to H.D. , No. 3646, dated the 19th May 1943.

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"Quietness and freedom form noise are indispensable to the full and free enjoyment of a dwelling house. As to what amount of noise or annoyance from noise will be sufficient to sustain an action, there is no definite legal rule or measure. It is aquestion of fact in each case, having regard to all the surrounding circumstances. Noise will create an actionable nuisance only if it materially interferes with the ordinary comfort of life judged by ordinary plain and simple notions and having regard to the locality; the question being one of degree in each case" (Ratanlal's Law of Torts, Pages 370-171). In Cali's case Earl of Halsbury said: "A dweller in towns cannot expect to have as pure air as free from smoke, smell ad noise if he lived in the country and distant from other dwellings, and yet an excess of smoke, smell and noise may give a cause of action, but in each of such cases it becomes a question of degree and the question is in each case whether it amounts to a nuisance which will give a right of action." A person living in a district specially devoted to a particularly trade cannot complain of any nuisance by noise caused by the carrying on of any branch of that trade without carelessness and in a reasonable manner. A resident in such a neighbourhood must put up with certain amount of noise. To give a householder a right of injunction against his neighbour for carrying on a noisy business in a trade district the noise must amount to a nuisance, regard being had to the pre-exsting noises. In a locality devoted to noisy trades, such asprinting and allied trades, if a printing house or a factory subjects he occupier of an adjoining residence to such an increase or noise as to interfere substantially with the ordinary comfort of human existence according to the standard of comfort prevailing in that locality, that is sufficient to constitute a questionable wrong entitling the occupier to an injunction. (1907 A.C. 121).

2. Nuisances are of two kinds : (1) public and (2) private.

A public nuisance is an act or an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity or which must necessarily injury, obstruct, cause danger or annoyance to persons who may have occasion to use any public right. (see section 268 of the Indian Penal Code).

3. "Where a person commits a public nuisance -- (a) he is liable to criminal prosecution under section 268, I.P.C.; and (b) he may be proceeded against under section 91 of th C.P.C.; and (c) he is liable to damages in a suit at the instance of a private individual who suffers special damage by reason of the nuisance i.e. damage beyond what is suffered by him in common with other persons affected by the nuisance. These remedies are concurrent. The institution of an criminal prosecution does not bar a suit under section91 of the C.P.C. nor does the institution of a suit under that section bar a criminal prosecution, though cases may occur where the Advocate General, may, in exercise of his discretion refuse his consent under section 91, C.P.C. where a criminal prosecution is pending in respect of the same act or omission". (See Mulla's C.P.C., p.321).

4. Private nuisance is defined to be anything done to the hurt or annoyance of the land, tenements or hereditaments of another and not amounting to trespass. It is an act of xxxx affecting some particular individual or individuals as distinguished from the public at large. It is in the quantum of annoyance that public nuisance differs from private; It cannot be the subject of indictment but may be the grounds for a civil action for damages or an injuction or both. (See Patanalal's Law of Crimes, pages 626-627).

5. "In order that any individual may have a private right of action in respect of a public nuisance - (1) he must show a particular injury to himself beyond that which is suffered by the rest of the public., ~~(2)~~ (2) such injury must be direct and not a mere consequence of injury, and (3) the

injury must be shown to be of a substantial character. Thus in order to entitle a person to maintain an action for damage caused by that which is public nuisance the damage must be particular, direct and substantial." (See Ratanlal's Law of Crimes, page 364).

Yd/-P.H.H. 30/7

Remembrancer of Legal Affairs.

U.P. to G.D. No. 50-P. dated the 30th July 1943.

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